

THE PUBLIC LANDS.

An Interesting Report from the Surveyor-General—The Unassigned Lands Historically Considered.

The decision of the Supreme Court in Banco, recently rendered, deciding that all of the unassigned lands are Government property, settles one of the most interesting questions that has arisen in our Courts.

The report of Prof. W. D. Alexander, Surveyor-General, made to the Minister of the Interior prior to the beginning of the suit, considers the subject from the historical point of view, and is well worthy of preservation. We have therefore obtained permission to publish it. The report is as follows:

In regard to the subject of the unassigned lands, referred to me, I beg leave to report briefly as follows: As was stated in my report of March 31, 1886, "this question is increasing in importance, and calls for settlement. There are 104 lands of this class, 88 on Hawaii, 12 on Molokai, 2 on Lanai and 2 on Oahu." The question does not seem to turn on statute law as much as on fundamental principles, and takes us back to the first organization of constitutional government on these Islands. I shall endeavor to make a brief statement of the case, not as a lawyer, but as a layman and a student of history.

It is admitted by all that under the ancient feudal system, the *allodial* of all land belonged to the King, not, however, as an individual, but "as the head of the nation or in his corporate right," to quote the language of the Land Commission. The Constitution of 1840 declares that the land of the Kingdom was not the private property of Kamehameha I. "It belonged to the chiefs and people in common, of whom Kamehameha I. was the head, and had the management of the landed property." Thus all lands forfeited for non-payment of taxes reverted to him. His consent was necessary for any transfers of real estate in the Kingdom, and also for real mortgages, and for seizure of land for debt. (See Old Laws, p. 179.) When the labor law first began to be regulated by law, every tenant was required to work one day in every week (Tuesday) for the King, and one day (Friday) for the landlord. But this law was afterwards reduced to 36 days in the year for the King, and an equal number for the landlords. (Old Laws, p. 27.) At the same time, it is doubtless true that Kamehameha I. would not have ventured at any time to dispossess one of those high chiefs whose titles to land dated from the Conquest, and who were consulted on all important affairs of state.

The ideas of a nation and of a government as distinguished from the person of the sovereign were formerly not understood, and first began to be clearly recognized in the Constitution of 1840. From that time it was seen more and more clearly that the King held a twofold character, first as an individual chief and land holder, and secondly in his official capacity as head of the government. It was in this dual character that the Land Commission decided that one-third of the lands in the Kingdom belonged to the King. It is hardly necessary in this report to repeat the history of the Land Commission and of the great Division or "Mahele" of 1848. "It was evident," to quote from the decision of the Supreme Court, "in the matter of the Estate of His Majesty Kamehameha IV., that the lands held by the King at the close of the 'Mahele' were not regarded as his private property, strictly speaking. Even before his division with the landlords, a second division between himself and the Government was clearly contemplated, and he appears to have admitted that the lands he then held might have been subjected to a commutation in favor of the Government in like manner with the lands of the chiefs." And on the very day after the "Mahele" or division with his chiefs had closed, viz., the 8th of March, 1848, he proceeded "to set apart for the use of the Government the larger part of his royal domain, reserving to himself what he deemed a reasonable amount of land as his own estate." This latter class of lands "he reserved for himself and his heirs forever," as his own private estate, and they are now known as Crown Lands, the word "heirs" having been declared by the Supreme Court to mean "successors to the throne." (Haw. Rep., Vol. II, p. 725.)

On the 7th of the following June, 1848, the Legislative Council passed the "Act relating to the lands of His Majesty, the King, and those of the Government," which merely confirms and ratifies what had already been done by the King, and designates the several Crown Lands and Government Lands by name. As the whole work of the "Mahele" was pushed through to completion in forty days, it resulted from undue haste and from imperfect information, that many lands, especially on Hawaii, were entirely overlooked. The question is, to whom do they belong? As all private claims not brought before the Land Commission were declared to be *forever barred*, and as even the claims recorded in the Mahele Book, which were not presented before June 30, 1862, have reverted to the Government according to law, no title based on any such claim can be entertained. It was entirely in the power of the King and Legislative Council, representing the nation, to prescribe the

conditions on which alone allodial titles to land could be obtained.

The next question is, whether the lands in question belong to the class of Government lands, or to that of Crown lands, or to the lineal heirs of Kamehameha III. As the Crown lands, which descend to the successors of the Hawaiian Crown, are expressly limited and designated by name in the Act of June 7, 1848, I cannot find any legal authority for adding the unassigned lands to that list. The decisions of the Supreme Court in the case of Kamehameha IV.'s Estate, cited above, and in the case of "Queen Emma vs. Commissioners of Crown Lands," tried in January, 1883, fully recognize the distinction between the Crown Lands Estate and the other private estate both real and personal of Kamehameha III. It was decided in the former case that "the descent of that part of his estate must be governed by the general law of inheritance," and in the latter case that certain pieces of land, held under L. C. Award No. 10,806, "not having been enumerated and made Crown Lands, were not affected by statutes relating to Crown Lands."

Leaving, then, to one side the claim of the Commissioners of Crown Lands, the question lies between the Government and the heirs of Kamehameha III., represented by Mrs. Panahi Bishop's Estate. The question is whether the lands in dispute, overlooked by inadvertence in the great division, shall be regarded as having belonged to the private estate of Kamehameha III., or to the Government as representing the nation. Several considerations tend to show that the parties who executed the original Mahele, Kamehameha III. and his Council, held the latter view. In the absence of any general declaration by the King and Council, we can infer their views from their action in special cases.

It is a significant fact that the King obtained an award of the Land Commission, No. 10,806, for certain town lots, which had not been included in the Mahele. As we have seen, those private claims, which were forfeited by neglect to present them before the Land Commission before February 14, 1848, *lapsed to the Government*, and not to the King. In the same way the claims of Konoiki, whose names were in the "Mahele Book," but who had failed to present their claims before the last day of June, 1862, were declared to have reverted to the Government. (Haw. Reports, Vol. III, p. 332.) What is more important is the fact that during the reign of Kamehameha III., the very lands in question were, as a class, treated as Government property, and that many sales from these lands were made by the Government. Royal Patents for which were signed by him. About the only exception is the case of the land of Puno, Hilo, which by some mistake was treated both as a Crown and a Government land.

It is certain that Kamehameha III. and the able men who composed his Council, and who laid the foundation of the tenure of real estate now existing, understood their own work better than reactionaries of a later generation. The powers delegated to the Land Commission were conferred by the Nation, King, Nobles and Commons, the latter being as yet but imperfectly represented. The titles finally patented emanated not from the King as an individual, but as representative of the Government. It cannot be pretended that he alone gave the people their "kuleanas," for example, or that the commission either in land or money was paid to him. It was for the common benefit, to endow a National Government, that both the King and the Nobles voluntarily ceded part of their lands to the Government, and the kuleanas were given by the chiefs as much as by the King.

It is true, indeed, that in such a period of transition, the true theory of the revolution taking place was not clearly understood by the majority of those concerned in it, and that inconsistencies may be found in some of their acts. But, in the view held by the master spirits of that peaceful revolution, the Government represents the Nation, including all the parties that divided the land, formerly held in common, and the Government is, therefore, to speak, the residuary legatee. At the same time, the Minister of the Interior is empowered by law to dispose of land in certain cases by quit-claim deeds, or otherwise, "by way of compromise or equitable settlement of the rights of claimants," and has exercised this right, notably in the case of the unassigned lands of Olole, Moana and Papa 2, in South Kona, Hawaii.

The case of certain lands like Kamaekahi, Molokai, may be similar to the above, and if they are claimed for benevolent or charitable purposes, it is probable that the Legislature would authorize the issuing of a patent to the petitioners.

I submit herewith a list of the unassigned lands, together with the sales or leases of the same, and cases of adverse occupation are noted when they exist.

I have the honor to be,

Your obedient servant,

W. D. ALEXANDER,

Surveyor-General.

Irritated Frenchman (to American who has taken him for a waiter)—"Sir, you have grossly insulted me. There is my card. My seconds will wait upon you, sir."

American—"Never mind your seconds, Frenchy. You can wait on me just as well. Pass me the Worcester sauce, and be quick about it, too."

In the Supreme Court of the Hawaiian Islands—In Banco. In Equity. October Term, 1888.

LEONG KAU AND LAM YIP, FORMERLY FIRM OF YEE HOP & CO. VS. C. MONTING AND THIRTEEN OTHERS, COMPRISING THE FIRM OF WING HONG WAI CO.

JUDGE C. J., McCULLY J., PRESTON J., BICKERTON J., DOLE J.

Opinion of the Court per JUDGE C. J.

This is a so-called cross-bill in the suit of C. Monting et al. vs. Leong Kau et al., praying for the reformation of certain articles of copartnership made between the parties on the 5th September, 1881. The copartnership capital was \$6,000, divided into ten "shares," \$600 each. The said firm of Yee Hop & Co., plaintiffs, held two shares. The copartnership articles read that the parties to the agreement "will give their attendance and personal labor or furnish substitutes, who shall work in their places and shall be paid by them out of their own private funds, and it is further agreed that each partner holding more than one share shall furnish a workman for each share over and above the initial share, and in the event of said partner's failure to furnish a workman or workmen for said share or shares, he is to forfeit and pay to the company sixteen dollars for each workman not so furnished." It was further agreed that "the members of the said firm of Yee Hop & Co. and the said C. Monting shall not give their personal labor, but furnish substitutes who shall work in their places, and shall be paid by them out of their private funds."

It is claimed in the cross-bill that an agreement in the Chinese character was first made between the parties, in which it was stipulated that the firm of Yee Hop & Co. should only supply one substitute to work in the rice plantation, although holding two shares in the business, and that the articles of copartnership in the English language thereafter made only required the plaintiff to furnish one substitute, but that the complainants in the former bill, (defendants herein) claim that plaintiffs are required by the articles of copartnership to furnish or pay for two laborers in respect of their two shares.

The Court is prayed that, if on full consideration of the meaning of said English articles, it shall appear that they fail to set forth and contain the true agreement between the parties, the defendants be required to execute an agreement which shall fully express the correct agreement made in the premises, etc.

BY THE COURT.—It does not seem to us that the evidence adduced brings the case within the rule of equity so as to entitle the plaintiffs to relief. We find the law to be as follows: "A deed should never be changed by parol, or a slight preponderance of evidence. The Court should be satisfied beyond a reasonable doubt." *Case vs. Peters*, 20 Mich. 303.

"It is well settled that to raise an equity to correct a deed, the mistake must be either admitted or directly proved." *Tripp vs. Hoesely*, Id. 263. "We recognize a mistake in fact as a ground for equitable jurisdiction," but relief will only be granted upon clear and satisfactory proof of the mistake in fact." *Buffner vs. McConnell*, 11 Ill. 215.

"Courts of equity will relieve against mistake, and will correct and reform deeds and instruments of the most solemn character to grant such relief. But when relief is sought from deeds or other writings, the mistake must be clearly proved." *Burgin vs. Gibson*, 26 N. J. Eq.

"This Court has equity jurisdiction in cases of accident and mistake, where the parties have not a plain and adequate remedy at law. Such jurisdiction has often been exercised in this State, in cases where the evidence is loose, equivocal or contradictory, or is in its texture open to doubt or opposing presumptions, the relief will not be granted." *Nevins vs. Dunlap*, 33 N. Y. 681.

"The evidence to show a mistake in a written instrument must be clear and strong, so as to establish the mistake to the entire satisfaction of the Court." *Gillette vs. Moon*, 2 Johns. Ch. 385, by Ch. Kent.

But we are of opinion that the articles of copartnership may be construed to mean, where they say "each partner holding more than one share shall furnish a workman for each share over and above the initial share," that each partner (treating the firm of Yee Hop & Co. as one partner) shall furnish a workman for each share over and above the initial interest—that is to say, the interest which the partners had at the formation of the partnership, which in the case of Yee Hop & Co. was two of the ten shares of \$600 each.

The bill does not pray to have this part of the agreement reformed, both parties apparently resting upon the idea that it means as we have found it to mean.

The clause, further on, that "the members of the said firm of Yee Hop & Co. and the said C. Monting shall not give their personal labor, but furnish substitutes who shall work in their places and shall be paid by them out of their private funds," does not necessarily mean that each member of the firm of Yee Hop & Co. shall furnish a substitute, that is, two men, or one man for each share of \$600 held by this firm.

The object of this clause is to exempt Yee Hop & Co. and C. Monting, who live in Honolulu, from the obligation to labor personally in the rice plantation at Waiata, and the use of the plural number in the word "substitutes" is necessary, as it refers to both Yee Hop & Co. and C. Monting,

and no more can be implied from this clause than that whatever number of workmen that either Yee Hop & Co. or Monting were required to furnish by that part of the agreement first referred to, should take their places and be paid by them. The misunderstanding has arisen from the legal anomaly, that an existing partnership (Yee Hop & Co.) is introduced as one member of a new partnership, in which personal services or their equivalent are required of each member of the new firm.

We think this whole matter, to wit, the construction of the articles of copartnership could have been raised by the answer to the original bill and the cross-bill rendered unnecessary. For the reason, therefore, that the articles of copartnership mean that the firm of Yee Hop & Co. are to furnish but one workman for their interest of two parts or shares of \$600 each in the firm of Wing Hong Wai Company, we decline to reform the articles. The decree below is reversed and the cross-bill dismissed, with costs to neither party.

Since writing the foregoing, we have heard and decided the case of C. Monting et al. vs. Leong Kau et al., (plaintiffs in the cross-bill).

This case arose on exceptions to the Master's Report, and among them was one to the refusal of the Master to charge the defendants with the wages of two workmen. This exception was abandoned at the hearing, and the decree confirming the Master's Report finds the defendants chargeable with the wages of only one laborer. The purpose of the cross-bill is accomplished as we have intimated it might be.

A. S. Hartwell for plaintiffs; W. R. Cagle and W. A. Whiting for defendants.

Dated Honolulu, Jan. 4, 1889.

Opinion of Mr. Justice Bickerton.

I fully concur with the final conclusion arrived at by the Court, viz., that the firm of Yee Hop & Co. are to furnish one workman for their interest of two parts or shares of \$600 each. With due respect and deference to the opinion of His Honor the Chief Justice and of my Associates, I respectfully dissent from the decision that the English articles should not be reformed (as prayed for in the bill) for the reason that the evidence adduced does not bring the case within the rule of equity, so as to entitle the plaintiff to relief. I concede that the law as found by the Court and quoted as correct, and I so understand it, but at the hearing of the case before me the evidence, although contradictory, was of such a nature that it convinced me beyond any doubt, and to my satisfaction, that a mistake had been made, and that the English article failed to set forth and contain the true agreement between the parties, as set forth in the Chinese agreement, which the evidence also convinced me beyond any doubt had been entered into by all the parties. It is certain that the defendants do not understand the articles to be, as the plaintiffs claim they should be, they, the defendants, claiming that Yee Hop & Co. are to furnish two workmen or substitutes. The articles are capable of several constructions in this regard, and are therefore uncertain and ambiguous.

Nothing has transpired at this hearing to give me any reason for changing my former opinion on this matter, viz.: First—That the Chinese agreement was made and entered into previous to the English articles being drawn and executed. Second—That the English articles do not conform to the Chinese agreement, and do not express clearly and understandingly the true agreement and understanding originally had between the parties, and should, therefore, be reformed accordingly.

January 4, 1889.

THE BRITISH NAVAL ESTIMATES.

Proposed Increase in the Navy—Much Stronger Now than the French.

In the course of the discussion in the House of Commons December 13th on the naval estimates, Lord Charles Beresford stated that England's active fleet comprised thirty line-of-battle ships, and if these were lost it would possibly result in the loss of the empire. The government ought to spend £20,000,000 annually. The navy required at once seventy-four vessels of various classes at a cost of £20,000,000.

Lord George Hamilton, First Lord of the Admiralty, admitted that the strength of the navy needed to be increased. The chief defect at present was in regard to the ordnance. England possessed thirty-four battle ships, while France had only eighteen. Her Majesty's Government were prepared to submit next session proposals based on England's needs in the event of war.

The estimates were passed.

John Henniker Heaton, member of Parliament for Canterbury, England, will visit the United States next year and endeavor to have a bill introduced in Congress providing for the adoption of his scheme for a universal penny postage.

The smoke-cloud which daily hangs over London is estimated by Prof. Chandler Roberts to contain about fifty tons of solid carbon and 250 tons of carbons in gaseous combinations. The expense of this waste of coal is calculated at \$13,000,000 a year, while the smoky atmosphere causes damage to property which Mr. Edwin Chadwick places at \$10,000,000 a year.

The invention of the phonograph and graphophone has brought out the singular fact that few persons, if any, know the sound of their own voice. When several persons in succession have spoken into one of these machines, each may recognize in its reproduction the voice of a friend or acquaintance, but does not identify his own. An analogous phenomenon has been observed in the matter of sight by photographers, who often satisfy in a likeness every one but the original. Thus it seems that we not only do not see ourselves as others see us, but we do not hear ourselves as others hear us.

MIND-READER BISHOP AT FAULT.

He Has an Exciting Encounter With Judge Goldthwaite of Houston, Tex.

There was a most exciting and ludicrous scene this afternoon in the rotunda of the Capitol Hotel between Judge Goldthwaite, a prominent lawyer of this city, and Washington Irving Bishop, the mind-reader, who has been in the city several days preparatory to opening an engagement at the opera house. Bishop had engaged a lady stenographer employed in Judge Goldthwaite's office to do some work for him, and when the work was completed it was sent to Bishop, together with the bill, amounting to \$2.50. Bishop kept the work, but did not pay the bill, alleging that it was an exorbitant charge.

Judge Goldthwaite, who has been a leading lawyer at this bar for many years, is a chivalrous old gentleman of fifty, and his blood boiled at a man who claimed to be world-renowned in his particular line should dispute so small a bill due a lady for work honestly performed.

And if Bishop, the mind-reader, had just taken the trouble to read the Judge's mind when he approached him at the Capitol this evening he would have paid the bill instantly. Bishop is a dressy kind of a fellow, wears a beaver and has about him that consequential air of self-importance that usually envelops the atmosphere around such people. He was inclined to be insulting when approached by Judge Goldthwaite, and he muttered something about the bill being a cheat and an imposition. At this juncture Judge Goldthwaite struck the mind-reader in the face, and was repeating the dose thick and fast, when the mind-reader took to his heels and ran into the billiard hall, closely followed by the irate Judge. The Judge chased the mind-reader thrice around a pool table without being able to get in another blow, and then the mind-reader skipped back into the office and up the steps to the first floor.

No sooner had Bishop reached the first floor than the Judge rushed into the office from the billiard room, exclaiming: "Where is the mind-reader? My God! I must catch the fellow!" Bishop replied from the first floor: "Judge, a man of very feeble brain could read your mind." The Judge looked up the steps to ward Bishop, and made for him at a rapid gait. Bishop did not cease his flight until he reached the fourth floor of the hotel, but some gentlemen stopped the Judge and took him back to the office.

Bishop immediately rang for a boy and sent the amount of the bill down to the clerk to be paid to Judge Goldthwaite. The affair is the talk of the city.—[Houston Corr.]

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